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No._____

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IN THE

Supreme Court of the United States

October Term, 1982

SALVATORE FINAZZO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE PROOFS INTRODUCED AT TRIAL CONSTITUTED A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT WHICH DESTROYED THE PETITIONER'S FIFTH AMENDMENT RIGHT NOT TO BE TRIED EXCEPT ON CHARGES SET FORTH IN A GRAND JURY INDICTMENT?

II

WHETHER THE IMPROPER ARGUMENT OF THE SPECIAL ASSISTANT UNITED STATES ATTORNEY IMPUGNED THE INTEGRITY OF DEFENSE COUNSEL AND INJECTED THE PROSECUTOR'S PERSONAL BELIEF OF THE GUILT OF THE PETITIONER, THEREBY DENYING THE PETITIONER A FAIR TRIAL AND DUE PROCESS?

LIST OF PARTIES

The parties in this proceeding in the United States Court of Appeals for the Sixth Circuit were as follows:

1. Salvatore Finazzo, Defendant-Appellant.
2. Dominic Licavoli, Defendant-Appellant.
3. United States of America, Plaintiff-Appellee.

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No._____

IN THE

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October Term, 1982

SALVATORE FINAZZO,
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v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Salvatore Finazzo, by his attorney, Ivan E. Barris, prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit on April 5, 1983.

OPINIONS BELOW

The Judgment and Commitment Order of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported, but is set forth in Appendix B herein. The Opinion of the United States District Court of Michigan, Southern Division, with respect to Petitioner's Post-Trial Motions is reported at 520 F. Supp. 1085 (E.D. Mich. 1981), and is set forth in Appendix C herein.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at __ F.2d __ (6th Cir. 1983), and is set forth in Appendix D herein. The Judgment of that Honorable Court is set forth in Appendix E herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 5, 1983. The time for filing the Petition for Writ of Certiorari continues to June 4, 1983. The jurisdiction of the Court is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or *enforce any* law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE TEXT OF THE STATUTES INVOLVED ARE SET FORTH IN APPENDIX A HEREIN.

STATEMENT OF THE CASE

At one o'clock in the morning on October 1, 1973, FBI agents broke into and entered the premises of AAA Store Fixtures, a business establishment operated by Petitioner, Salvatore Finazzo, and planted electronic equipment (bugs) for the purpose of intercepting oral communications on the premises. On December 25, 1973 at two o'clock in the morning, FBI agents again broke into and entered the premises of AAA Store Fixtures and took the "bugs" out.

Dominic Licavoli, Salvatore Finazzo, Salvatore Lauricella, John Bobal and Frank Ilacqua were indicted by a Federal Grand Jury sitting in the Eastern District of Michigan on April 9, 1975. Petitioner Finazzo was indicted on four counts. Count I was for aiding and abetting the giving or promising of something of value to a public official in violation of 18 U.S.C. §§ 201(f) and 2. Count II was for aiding and abetting a public official in asking, demanding, exacting, soliciting, seeking, accepting, receiving and agreeing to receive something of value, contrary to 18 U.S.C. §§ 201(g) and 2. Count III as renumbered,[1] was for causing Anna Marie Milano to travel in interstate commerce, Finazzo having the intention to carry on and facilitate an unlawful activity, bribery, in violation of 18 U.S.C. §§ 1952 and 2. Count IV, as renumbered, was for conspiracy to commit the offenses in Counts I, II, and III, contrary to 18 U.S.C. § 371.

---

[1] The original Count III was dismissed pursuant to a Pre-trial Motion to Quash. The trial court renumbered Count IV as Count III, and Count V as Count IV when he instructed the jury. All references to Count III and IV are to the Counts as renumbered. The Indictment is set forth herein as Appendix F.

Then-Chief Judge of the United States District Court for the Eastern District of Michigan, Southern Division, Damon Keith, granted Finazzo's Motion to Suppress all evidence obtained by the Government from the electronic interception of oral communications on the premises of AAA Store Fixtures. *United States* v. *Finazzo*, 429 F. Supp. 803, 808 (E.D. Mich. S.D. 1977). The United States Court of Appeals for the Sixth Circuit affirmed Judge Keith's decision. *United States* v. *Finazzo*, 583 F.2d 837 (1978).

Pending the Government's appeal of the granting of Finazzo's Motion to Suppress by the District Court and the affirmance by this Honorable Court, the Government proceeded to trial against three other persons named in the Indictment, Salvatore Lauricella, John Bobal and Frank Ilacqua. They were subsequently acquitted on August 15, 1979 following a jury trial before the Honorable Damon Keith.

The remaining defendants, Salvatore Finazzo and Dominic Licavoli, were tried after this Honorable Court vacated the Court of Appeal's opinion in this case in light of its opinion in *Dalia* v. *United States*, 441 U.S. 238, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979). *United States* v. *Finazzo*, 441 U.S. 929, 99 S.Ct. 2047, 60 L.Ed.2d 657 (1979).

Evidence obtained by electronically intercepting conversations at AAA Store Fixtures on November 1, 1973, November 8, 1973, December 10, 1973, and December 12, 1973 was introduced at this trial.

The evidence at trial indicated that during the November 1, 1973 conversation, Licavoli told Finazzo that his friend Lauricella, an official in the Bonding Department of the Small Business Association (SBA) in

Washington had helped Ilacqua of B.I.M. Building Company of Cleveland, Ohio obtain a bond for a $3,000,000 excavation job to be done for Forest City, Inc. (Exhibit 54B, Deferred Joint Appendix 44a-54a). Licavoli said that Ilacqua had promised Lauricella $18,000.00 for his help, the bond had already gone through and it was too late to stop it, and now Ilacqua had reneged on his promise. (Exhibit 53B, Deferred Joint Appendix 45a, 49a).

Finazzo speculated that Ilacqua must belong to the union and that the union could "give him a tough way to go." (Exhibit 53B, Deferred Joint Appendix 47a). Licavoli explained that there was $3,000.00 in it, $1,000.00 for him, $1,000.00 for Finazzo and $1,000.00 for "Skip." (Exhibit 53B, Deferred Joint Appendix 47a).

After further discussion, Finazzo and Licavoli agreed to write a letter to "Skip" asking him to do them a favor and collect the money. (Exhibit 53B, Deferred Joint Appendix 56a-57a). Licavoli apparently wrote the letter, read it to Finazzo and addressed it to Skippy. (Exhibit 53B, Deferred Joint Appendix 64a-65a). Finazzo said he would have his daughter, Anna Marie Milano, carry the letter back with her when she returned home to Cleveland after her mother's operation. (Exhibit 53B, Deferred Joint Appendix, 53a, 56a, 65a).

On November 9, 1973, Licavoli spoke with Finazzo and asked if he had heard from his daughter. (Exhibit 54B, Deferred Joint Appendix 68a). Finazzo replied that he had not, but she was coming back tomorrow and might visit. (Exhibit 54B, Deferred Joint Appendix 68a). Finazzo said he would talk to her and see what they did. (Exhibit 54b, Deferred Joint Appendix 68a).

On December 10, 1973, Finazzo received a telephone call from an unidentified male. (T.T. 375-376, Deferred Joint Appendix 18a, 19a). The caller referred to a letter sent to Skip and stated that "everything is gonna be all right, straightened out in full, December fourteenth." (Exhibit 55B, Deferred Joint Appendix 72a). Finazzo placed a telephone call to Licavoli, but did not reach him. (Exhibit 55C, Deferred Joint Appendix 74a). On December 12, 1973, Finazzo told Dominic Talerico that Licavoli had not returned his call. (Exhibit 56B, Deferred Joint Appendix 75a).

On or about December 14, 1973, Bobal and Ilacqua each wrote an $11,500.00 check on their company account, (T.T. 513, Deferred Joint Appendix 24a), which they converted to $23,000.00 in cash on that date. (T.T. 514, Deferred Joint Appendix 25a, 27a). On December 14, 1973, Lauricella flew to Detroit from Washington, D.C. (T.T. 412-414, Deferred Joint Appendix 20a-22a). On January 3, 1974, Lauricella asked the Financial Services Division of the Small Business Administration to delay the sending of their official letter to the bank that the application for a guaranteed loan for Bobal and Ilacqua's company had been declined. (T.T. 526, Deferred Joint Appendix 32a).

Following the trial, Petitioner Finazzo was jury-convicted on each count in the Indictment. Judgment was entered on March 12, 1981. Petitioner Finazzo was sentenced to a term of two years imprisonment on Counts I and II, three years imprisonment on Counts III and IV, such terms to run concurrently, and a fine of Ten Thousand ($10,000.00) Dollars on each Count, totaling Forty Thousand ($40,000.00) Dollars.

On April 5, 1983, the United States Court of Appeals for the Sixth Circuit affirmed the conviction on each count.

REASONS FOR ALLOWANCE OF THE WRIT

I

THE COURT OF APPEALS ERRONEOUSLY DECIDED A QUESTION OF CONSTITUTIONAL LAW IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT, TO-WIT: THE PROOFS INTRODUCED AT TRIAL CONSTITUTED A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT WHICH DESTROYED THE PETITIONER'S FIFTH AMENDMENT RIGHT NOT TO BE TRIED EXCEPT ON CHARGES SET FORTH IN A GRAND JURY INDICTMENT.

The United States Court of Appeals for the Sixth Circuit erred when it held that there is no substantial likelihood that the Petitioner was convicted of an offense other than that charged by the Grand Jury. By so holding, that Court is in conflict with applicable decisions of this Honorable Court. The issue is an important one as it involves a substantial Constitutional right — the Fifth Amendment right not to be tried except on charges set forth in a Grand Jury indictment.

The Fifth Amendment of the Constitution of the United States provides, in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury * * * ."

In *Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1886), this Honorable Court set forth a *per se* rule prohibiting judicial amendments to the terms of an indictment. In *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), this Honorable Court

held that where there was a variance, in the sense of a variation between pleading and proof, which destroyed the defendant's substantial right to be tried on charges presented in the indictment returned by the Grand Jury, the effect is the same as if the trial court had permitted a formal amendment. The Court held that "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 218.

The indictment in the instant case charged a conspiracy between Finazzo, Licavoli, Lauricella, Bobal and Ilacqua from on or about May 1, 1973 and continuously thereafter up to January 31, 1974. It was specifically charged that, as part of this conspiracy:

1. Finazzo, Licavoli, Bobal and Ilacqua would directly and indirectly give Lauricella, a public official, $18,000.00 for and because of efforts by him to cause and effectuate guarantees by the Small Business Administration of certain surety bonds.

2. Lauricella, through Finazzo and Licavoli, would directly and indirectly ask, demand, exact, solicit, seek, accept, receive and agree to receive $18,000.00 from Bobal and Ilacqua for and because of efforts by Lauricella to cause and effectuate guarantees by the Small Business Administration of certain surety bonds.

3. Finazzo and Licavoli would cause Anna Marie Milano to travel in interstate commerce; Finazzo and Licavoli having the intention to promote and carry on and facilitate the promotion and carrying on of an unlawful activity, bribery, and thereafter Finazzo and Licavoli would promote, carry on and facilitate the promotion and carrying on of the said unlawful activity, bribery.

The proofs at trial indicated that Bobal and Ilacqua promised Lauricella $18,000.00 to effectuate Small Business guarantees of certain surety bonds issued by Cincinnati Insurance Company to assure performances by B.I.M., Inc. on certain construction and excavation projects. The proofs also indicated that after the guarantees were effectuated, Bobal and Ilacqua reneged on their promise and refused to pay the $18,000.00. The proofs show that on November 1, 1973 Co-Defendant Licavoli, a "buddy" of Lauricella's, told Petitioner of the arrangement between Bobal, Ilacqua and Lauricella and that Ilacqua reneged on the agreement. The Co-Defendant Licavoli also indicated that Lauricella would pay Three Thousand ($3,000.00) Dollars to have Licavoli and Petitioner collect the money promised by Ilacqua. During the discussion, Petitioner stated that $3,000.00 wasn't enough money to collect $18,000.00 and that the price ought to be half. Petitioner and Licavoli also discussed how they could force or threaten Bobal and Ilacqua to pay the money. They agreed to write a letter to "Skippy," whom the Government inferred was John Felice, an officer of a Teamster's Local, who would "give him a tough way to go" and "can put this guy out of business." Petitioner and Licavoli agreed that Petitioner would give the letter to his daughter, Anna Marie Milano, to take back to Cleveland when she returned home.

In the instant case, Petitioner was charged with conspiracy to commit acts of bribery with co-conspirators, Lauricella, Bobal, Ilacqua and Licavoli. The proofs establish, however, that rather than Petitioner being in concert of action and having a common purpose with Bobal and Ilacqua as required to establish a

conspiracy, [*Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465, 41 S.Ct. 172, 65 L.Ed. 349 (1921)], Petitioner was in an antagonistic relationship to Bobal and Ilacqua. According to the Government's proofs, Petitioner was attempting to collect money for Lauricella, for a price, by putting Teamster Union pressure on Bobal and Ilacqua.

This is not the type of activity which connotes a conspiratorial relationship, much less a conspiracy to bribe. Bribery involves a voluntary payment to influence another's actions. Extortion involves duress, a threat of physical or economic harm, which induces another's actions. *United States* v. *Addonizio*, 451 F.2d 49, 72 (3rd Cir. 1971), *cert denied*, 405 U.S. 936 (1972). It is inconceivable that Bobal and Ilacqua agreed to conspire to be threatened with economic harm by Teamster officials. The only conceivable concert of action proven at trial on the part of Petitioner was a conspiracy with Licavoli *to extort* money from Bobal and Ilacqua and to cause Anna Marie Milano to travel interstate *for the purpose of facilitating the extortion.*

Introduction of this evidence and the complete lack of proof of a conspiratorial agreement between Petitioner and Bobal and Ilacqua created a substantial likelihood that Petitioner was convicted of an offense other than that charged by the Grand Jury.

Petitioner was further prejudiced because the Trial Court submitted the substantive bribery and Travel Act offenses alleged in Counts I, II, and III to the jury on the theory of aiding and abetting and gave the following "Pinkerton" charge:

> "Moreover, if you find that a particular Defendant is guilty of conspiracy as charged in Count IV, you may also find that Defendant

> guilty of the substantive offenses charged in Counts I, II and III of the Indictment, provided that you find that the essential elements of the conspiracy Count have been established beyond a reasonable doubt and provided you also find beyond a reasonable doubt that first, the offense defined in the substantive Count was committed pursuant to the conspiracy; and second, that the particular Defendant was a member of the conspiracy at the time the substantive offense was committed.
>
> Under the conditions just defined, a Defendant may be found guilty of a substantive Count in which he is named, even though he did not participate in acts constituting the offense as defined in the substantive Count. The reason for this is that the co-conspirator committing a substantive offense pursuant to a conspiracy is held to be the agent of the other conspirators." (T.T. 792).

The charge allowed the jury to consider the acts and deeds of Bobal and Ilacqua, who were not, as a matter of law, co-conspirators, as being the acts and deeds of the Petitioner.

In *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 80 L.Ed. 1489 (1946), this Honorable Court held that although there was no evidence introduced to show that one of the defendants actually committed the substantive offense of which he was convicted, he could be found guilty of the substantive crime:

> "if it was found at the time those offenses were committed petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it." *Id.* at 645.

It has been said that the "Pinkerton" instruction should not be given automatically and that a failure of proof on the conspiracy count might taint conviction on a substantive count, unless the evidence on the substantive counts is strong. *United States* v. *Sperling*, 506 F.2d 1323, 1341-1343 (2nd Cir. 1974).

In *United States* v. *Cantone*, 426 F.2d 902, 905 (2nd Cir. 1970), the United States Court of Appeals for the Second Circuit held that where there is no direct proof that a defendant committed a substantive offense for which he is charged and where the evidence was insufficient to establish beyond a reasonable doubt that he was a member of the conspiracy in furtherance of which the substantive offense was committed, it was reversible error to give the "Pinkerton" charge as means of obtaining a conviction on the substantive count. The Court also held that this error tainted the conspiracy conviction. *Id.*

In the instant case, Petitioner was charged with three substantive offenses. Count I charged aiding and abetting the violation of 18 U.S.C. § 201(f), which provides in pertinent part:

> "Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official * * * for or because of any official act performed or to be performed by such public official [commits an offense in violation of the laws of the United States]."

Count II charged aiding and abetting the violation of 18 U.S.C. § 201(g), which provides in pertinent part:

> "Whoever, being a public official * * * otherwise than as provided by law for the proper discharge

> of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him [commits an offense in violation of the laws of the United States]."

There is substantial evidence that Petitioner *did not* aid and abet the "promising or offering" aspect of Count I and *did not* aid and abet the "asking, demanding, exacting, soliciting, seeking or agreeing to receive" aspect of Count II. The Government's evidence, as summarized above revealed that *prior to November 1, 1973, the first time there is evidence of any activity on the part of Finazzo,* Lauricella agreed to use his efforts as an official of the Small Business Administration to cause and effectuate guarantees by the SBA of certain surety bonds in return for payment of $18,000.00. It is established, therefore, that *prior to* any activity on the part of Finazzo, the promise or offer had been made and the public official had asked, demanded, exacted, solicited, sought or agreed to receive the unlawful gratuity. Thus, there is no evidence that the Petitioner aided or abetted these aspects of the substantive offenses charged in Count I and Count II.

There is no direct evidence that the unlawful gratuity was given or received. Therefore, there is no direct evidence that Petitioner aided and abetted the "giving" or "receiving" aspects of substantive Count I and Count II.

There was circumstantial evidence introduced with respect to the "giving" or "receiving" aspects of substantive Count I and Count II. However, very little of this evidence involves the conduct of Petitioner.

The circumstantial evidence which was introduced may be summarized as follows:

1) On November 1, 1973, Petitioner and Licavoli agreed to write a letter to Skip and ask him to use his position with the Union to pressure Ilacqua into paying the $18,000.00 Ilacqua owed to Lauricella. (Exhibit 53B, Deferred Joint Appendix 47a-56a).

2) Petitioner received a phone call on December 10, 1973, from an unidentified person saying that with respect to the letter to Skip, everything would be straightened out in full by December 14, 1973. (Exhibit 55B, Deferred Joint Appendix 72a).

3) Bobal and Ilacqua each wrote a check for $11,500.00 on the company checking account (T.T. 513, Deferred Joint Appendix 24a), which they converted to $23,000.00 in cash on December 14, 1973 (T.T. 514, 521, Deferred Joint Appendix 25a, 27a).

4) On December 14, 1973, Lauricella flew to Detroit from Washington, D.C. (T.T. 412-414, Deferred Joint Appendix 20a-22a).

5) On January 3, 1974, Lauricella asked the Financial Services Division of the SBA to delay the sending of a letter telling a bank that an application of Bobal and Ilacqua's company for a guaranteed loan has been declined. (T.T. 526, Deferred Joint Appendix 32a).

This circumstantial evidence does not constitute sufficient proof that the gratuity was given or received or that Petitioner aided and abetted the "giving" or "receiving" of the gratuity. Bobal and Ilacqua had

promised Lauricella $18,000.00, not $23,000.00. There is no evidence that Bobal and Ilacqua went to Detroit on December 14, 1973 or sent anyone to meet Lauricella there. There is no evidence that Petitioner did anything on December 14, 1973 which could be construed as "giving" the gratuity or aiding and abetting the "giving" or "receiving" of the gratuity. Further, Bobal, Ilacqua and Lauricella were acquitted of these charges in a separate trial.

The Government's failure to prove Petitioner's participation in the conspiracy charged, along with the lack of sufficient evidence that he committed the substantive offenses alleged in Counts I and II, raises the substantial likelihood that the convictions on the substantive counts were tainted by the giving of the "Pinkerton" charge.

The third substantive count that Petitioner was charged with is violation of 18 U.S.C. §§ 1952 and 2.

Section 1952 of Title 18, United States Code, provides in pertinent part:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to * * *
>
> > (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and *thereafter* performs or attempts to perform any of the acts specified in subparagraph * * * (3) [shall be guilty of an offense against the laws of the United States].

> (b) As used in this section "unlawful activity means * * * (2) * * *, bribery, * * * in violation of the laws of the State in which committed or of the United States." (Emphasis supplied).

Count III of the Indictment charged a violation of the above statute, commonly known as the Travel Act, in that Petitioner and Licavoli, with the intention to promote and carry on and facilitate the promotion and carrying on of the unlawful activity of bribery, caused Anna Marie Milano to travel in interstate commerce from Mount Clemens, Michigan to Cleveland, Ohio and that Petitioner and Licavoli did thereafter promote, carry on, and facilitate the promotion and carrying on of the said bribery.

The evidence adduced by the Government at trial was insufficient to sustain a finding of guilt beyond a reasonable doubt of this statute because of the failure of proof that Petitioner performed some act in furtherance of the *bribery after* the alleged interstate travel of Anna Marie Milano. Again, the substantial likelihood exists that giving the "Pinkerton" charge tainted Petitioner's conviction on Count III.

The test for determining whether the evidence is sufficient to sustain a finding of guilt is "whether, taking the evidence in the view most favorable to the government, there is substantial evidence to support the verdict." *Glasser* v. *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 860 (1942); *United States* v. *Leon*, 534 F.2d 667, 676 (6th Cir. 1976). "Substantial evidence supporting conviction on appeal is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *United States* v. *Kubeck*, 487 F.2d 1256, 1258 (6th Cir. 1973).

Viewing the evidence in the light most favorable to the Government, the tape of November 1, 1973 shows that Petitioner and Licavoli agreed to write a letter to Skippy asking him to put pressure on Ilacqua to collect money. Petitioner said he would give the letter to his daughter, Anna Marie Milano, to take back to Cleveland with her, when she returned home after her mother's operation, to give to Skippy. Eight day later another conversation between Licavoli and Petitioner was taped. Licavoli asked Petitioner if he had heard from his daughter. He replied that he had not heard from her, that she was going to come back tomorrow, and then he would see what they did. On December 10, 1973, a conversation between Petitioner and an unknown caller was taped. (Exhibit 55B, Deferred Joint Appendix 69a). The caller referred to a letter sent to Skip and said, "Did you want him to do something?" (Exhibit 55B, Deferred Joint Appendix 71a). Petitioner said, "Yeah," and the caller told Petitioner that "everthing would be straightened out in full by December fourteenth." Petitioner replied, "Okay." (Exhibit 55B, Deferred Joint Appendix 72a). A few minutes after this call, Petitioner tried to call Licavoli, but was unable to reach him. On December 12, 1973, a conversation was taped between Petitioner and Dominic Talerico. (Exhibit 56B, Deferred Joint Appendix 75a). Petitioner said that, "Dominic (Licavoli) was supposed to call;" "a guy from Cleveland had called" and that "Dominic makes me do all calls." (Exhibit 56B, Deferred Joint Appendix 75a).

The Travel Act requires that the illegal acts, which form the basis of the prosecution, be performed *after* the use of a facility in interstate commerce. *United States* v. *Eisner*, 533 F.2d 987, 992-993 (6th Cir. 1976); *United States* v. *Prince*, 529 F.2d 1108, 1111 (6th Cir. 1976).

This record is devoid of substantial and competent evidence that Petitioner promoted or carried on or facilitated the promotion or carrying on of the *bribery after* Mrs. Milano allegedly returned to Cleveland. The only evidence that could possibly be so interpreted is Petitioner's response of "Okay" to the statement that everything would be straightened out in full by December 14th, which he made during the conversation of December 10, 1973. Petitioner submits that this was not "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that he promoted, carried on or facilitated the promotion or carrying on of the *bribery*. There is no proof that this statement contributed to the progress or the furtherance of the bribery or that it was so intended.

The statement was in response to a question as to whether Petitioner had asked Skip to do something and being told it would be taken care of by December 14th. What Petitioner had asked Skip to do was put Union pressure on Ilacqua. If anything, the statement was in furtherance of extortion, not the bribery.

Petitioner's conviction on Count III, like his conviction on Counts I and II, was tainted by the giving of the "Pinkerton" charge in light of the Government's failure to prove Petitioner's participation in the conspiracy charged and the lack of substantive proof of an essential element of the substantive offense.

A review of the record in the instant case reveals that there was a variation between the pleading and proof which destroyed the Petitioner's substantial right to be tried on charges presented in the Indictment returned by the Grand Jury. The taint of this variation spilled over to the substantive offenses because the Trial Court gave a "Pinkerton" charge.

II

THE COURT OF APPEALS ERRONEOUSLY DECIDED A QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE COURT, TO-WIT: THE IMPROPER ARGUMENT OF THE SPECIAL ASSISTANT UNITED STATES ATTORNEY IMPUGNED THE INTEGRITY OF DEFENSE COUNSEL AND INJECTED THE PROSECUTOR'S PERSONAL BELIEF OF THE GUILT OF THE PETITIONER, THEREBY DENYING THE PETITIONER A FAIR TRIAL AND DUE PROCESS.

The Special Assistant United States Attorney began his rebuttal argument with the following remarks:

> "MR. NEWCOMER. May it please the Court, counsel for the Defendants and members of the jury.
>
> There is a wonderful series on Channel 56 about a lawyer named Rumpole, a story about an English barrister, who says of his colleagues, who represent criminal Defendants in Old Bailey in London, that the second most rewarding experience for a barrister is to, the second most, were his words, is for a barrister to achieve the acquittal of an innocent man, and I leave, as does Rumpole, for you to speculate what the first greatest achievement is. No, I won't leave it to your speculation. *I will tell you that the greatest achievement for a counsel, for counsel in this case, would be acquittal of a guilty person.*" (Emphasis supplied). (T.T. 740).

Defense counsel promptly objected, and at the appropriate time moved for a mistrial based upon the above-quoted remarks. Although the Trial Court found that the remarks were improper, the motion was denied.

At the close of trial, defense counsel moved for a Judgment of Acquital Notwithstanding the Verdict, Or, In the Alternative, For a New Trial. Both motions were denied.

On appeal, the United States Court of Appeals for the Sixth Circuit found that these remarks were "unseemly," but held "any possible taint from the unseemly comment was in our judgment removed by the curative and sensible instructions given by the able trial judge." The Court did not set forth which instructions they deemed to have "cured" the error.

The instructions which the Trial Court gave immediately following his ruling on the Motion for Mistrial were as follows:

> "I want to say preliminarily that this has been a very well tried case by all attorneys. I think we have seen excellent counsel on both side here who have conducted themselves well, professionally, and I think, as I say , it has been a very well tried case, and that it is important and also caused this case to move along properly.
>
> Now let me make a few preliminary remarks, if I may, before I start into discussing this charge.
>
> First of all, I want to remind you what I reminded you at the very beginning of this case. In deciding this case, you must decide it solely and completely from the sworn testimony you heard from that witness stand and from such Exhibits as the Court has received in evidence. Incidentally, if you want any of the Exhibits in your juryroom, you may have them merely by asking for them, but the evidence consists of the testimony of the witnesses and the Exhibits received into evidence and nothing more.

> Argument of counsel, colloquy between the Court and counsel, opening statements of the lawyers, final arguments of the lawyers, all of these things are important in pointing up the issues in the case, but when you come to decide it, you must decide it solely and completely from the evidence."

The record reveals no other instructions which could be characterized as curative instructions on the issue.

This Honorable Court set forth the proper role of the United States Attorney in *Berger* v. *United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocents suffer. He may prosecute with earnestness and vigor — may strike hard blows, he is not at liberty to strike foul ones. *It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*" (Emphasis added).

The Government may not inject improper or prejudicial material that deprives an accused of his right to a fair trial. More importantly, the United States Attorney may not express his personal knowledge of the guilt of the Defendant to the jury.

In the instant case, the comments by the Special Assistant United States Attorney impugn the integrity of defense counsel and can be reasonably construed to be based on personal belief. He said, "the greatest achievement for counsel, for counsel in *this* case would be acquittal of a guilty person." This is tantamount to saying the defense counsel will attain a great achievement in this case, if they obtain an acquittal, because the defendant is guilty.

The above-quoted remarks by the Special Assistant United States Attorney, in the last, unrebuttable, statement this jury would hear from the United States, are wholly improper. Both of the lower courts found the remarks to be improper. These remarks were specific, directing the jury's attention to the case, not general comments about a lawyer's duty to defend the guilty as well as the innocent — "the greatest achievement for counsel in *this* case would be acquittal of a *guilty* person." The remarks were flagrant and deliberate. Because they were made in the last, unrebuttable statement that the jury heard before they began deliberating, there was a greater tendency to mislead the jury and prejudice the defendant than if they had been made earlier in the trial. There was no opportunity for defense counsel to respond to the improper remarks.

The instructions given by the Trial Court did not remove the prejudicial taint of the Prosecutor's remarks. The Trial Judge did not admonish the jury immediately after the remarks were made. After the Motion for Mistrial was heard, the Court made no direct reference to the remarks at issue. Instead, the Trial Court told the jury that they had "seen excellent counsel on both sides who have conducted themselves well professionally." Rather than cautioning the jury regarding the Prosecutor's improper conduct, the Trial Court

complimented him in front of the jury. If anything, the Trial Court's remarks gave credence to those of the Prosecutor. The rest of the so-called "curative" instructions are nothing more than general remarks that could be made at any trial with respect to what constitutes evidence for the jury to consider. They cannot be fairly read as instructions which cured the taint of the Prosecutor's improper remarks.

The Prosecutor's remarks went right to the main issue in this case — the guilt or innocence of the Petitioner. As set forth more fully in Argument I, *supra*, proof of guilt in this case was not so overwhelming that it can be said that the Petitioner was not prejudiced by the improper remarks.

Petitioner was deprived of his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the Petition for Writ of Certiorari be granted, or, in the alternative, that the Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction be summarily reversed.

Respectfully submitted,

By: /s/ IVAN E. BARRIS (P10484)

Attorney for Petitioner
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DATED: May 27, 1983.

APPENDICES

APPENDIX A

TEXT OF STATUTES INVOLVED

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 201. Bribery of public officials and witnesses

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Travel Act, 18 U.S.C. § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

APPENDIX B

JUDGMENT AND COMMITMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(United States of America vs. Salvatore Finazzo a/k/a Sam Jacobs, Sam Finazzo, Defendant — Docket No. 75-80597-01)

Counsel In the presence of the attorney for the government the defendant appeared in person on this date: March 12, 1981, with counsel Ivan Barris.

Finding & Judgment There being a finding/verdict of Guilty, Defendant has been convicted as charged of the offense(s) of

Count 1: Giving a Bribe 18:USC:201(f) and 2.

Count 2: Receiving a Bribe 18:USC:201(g) and 2.

Count 3: Causing a Person to Travel in Interstate Commerce 18:USC:1952 and 2.

Count 5: Conspiracy 18:USC371

Sentence or Probation Order The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count 1: Two (2) years and a fine of $10,000.

Count 2: Two (2) years and a fine of $10,000.

Count 3: Three (3) years and a fine of $10,000.

Count 5: Three (3) years and a fine of $10,000.

All terms of confinement to run concurrently. All fines as imposed are cumulative the total amount being $40,000.

Special Conditions of Probation This Defendant To Surrender To The U.S. Marshall On April 1, 1981 Unless His Claim Of Appeal Has Been Filed And An Appeal Bond Has Been Set.

Additional Conditions of Probation In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum period of the years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Signed By: Horace W. Gilmore
U.S. District Judge

Date: March 12, 1981

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshall or other qualified officer.

(certification omitted)

APPENDIX C

OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(August 27, 1981)

(United States of America, Plaintiff, v. Salvatore Finazzo and Dominic Licavoli, Defendants — Crim. A. No. 75-80597-2.)

Gilmore, District Judge.

This matter is before the Court upon a motion by defendant Licavoli to correct allegedly illegal sentences imposed upon him. The claim is that the sentences violate the double jeopardy clause of the Fifth Amendment to the Constitution.[1] The Court concludes they do not.

Defendant was convicted of inducing, procuring and causing the giving of an unlawful gratuity to a public official, in violation of 18 U.S.C. § 201(f) and 18 U.S.C. § 2 (Count 1); aiding and abetting the asking, demanding, exacting, soliciting, seeking, accepting, receiving, or agreeing to receive, an unlawful gratuity, in violation of 18 U.S.C. § 201(g) and 18 U.S.C. § 2, (Count 2); and conspiracy to violate 18 U.S.C. §§ 201(f), 201(g), 1952 (Travel Act — Count 4) and 2, all in violation of 18 U.S.C. § 371. Defendant Licavoli was acquitted of the offense charged in Count 4, the Travel Act count (18

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[1] " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

U.S.C. § 1952), and convicted of the other counts. He was sentenced to two years imprisonment on Count 1; two years imprisonment on Count 2, and three years imprisonment on Count 5, the conspiracy count. The sentences of imprisonment are to run concurrently. In addition, Licavoli was fined $10,000 on each count, for a total of $30,000.

Defendant's contention is that the sentences were imposed in violation of the Fifth Amendment double jeopardy clause. Relying principally upon *United States* v. *Austin*, 529 F.2d 559 (CA6 1976), and *Pandelli* v. *United States*, 635 F.2d 533 (CA6 1980), defendant claims that because the "same evidence" was used to convict him of both the substantive counts and the conspiracy count, and the facts alleged in the indictment required a concert of action for each of the counts, his punishment for three offenses violates the double jeopardy prohibition of the Constitution.

[1] The Constitutional prohibition against double jeopardy encompasses three guarantees: 1) protection against a second prosecution for the same offense after acquittal; 2) protection against a second prosecution for the same offense after conviction, and 3) protection against multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In the instant case, the Court is concerned only with the third of these three guarantees.

[2] In *Brown* v. *Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), Justice Powell, writing for the majority, articulated the principal test for determining whether two offenses are the same for the purpose of barring successive prosecutions. Quoting from *Blockburger* v. *United States*, 284 U.S. 299, 52 S.Ct. 180, 76

L.Ed. 306 (1932), which in turn relied on *Gavieres* v. *United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911), the Court held:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . . " *Brown*, 432 U.S. at 166, 97 S.Ct. at 2225.

Thus the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than the actual evidence to be presented at trial. As states in a significant footnote in *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 1293 n.17, 43 L.Ed.2d 616 (1975):

> "The test articulated in *Blockburger* v. *United States*, 284 U.S. 299 [52 S.Ct. 180, 76 L.Ed. 306] (1932), serves a generally similar function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction. In determining whether separate punishment might be imposed, *Blockburger* requires that courts examine the offenses to ascertain 'whether each provision requires proof of a fact which the other does not'. *Id.* at 304 [52 S.Ct. at 182]. As *Blockburger* and other decisions applying its principle reveal . . . *the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.*" (Emphasis added).

Recent United States Supreme Court cases reiterate that Court's understanding that the *Blockburger* test focuses on the statutory elements of the offense rather than on the actual evidence presented at trial or the facts alleged in the particular indictment. *See Illinois* v. *Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); *Whalen* v. *United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), and *Albernaz* v. *United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981). The critical question, therefore, is whether each count requires proof of a fact that the other does not. Application of the test emphasizes the statutory elements of the substantive offense involved, rather than the particular manner in which the offense was committed in the indictment, or the particular evidence offered to prove it in a specific trial — that is, whether it is possible to sustain a conviction under the offense charged, on grounds that differ from those necessary to sustain a conviction on the conspiracy count. *See United States* v. *Previte*, 648 F.2d 73 (CA1 1981).

[3, 4] Generally, of course, separate punishment can be imposed for conspiracy to do an act, and for the subsequent accomplishment of that act, without violating the double jeopardy clause. Allegation of an independent crime as an overt act of a conspiracy does not necessarily immunize the defendant from indictment. *Iannelli, supra*; *United States* v. *Mayes*, 512 F.2d 637 (CA6 1975), cert. den. 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975); *United States* v. *Bradley*, 421 F.2d 924 (CA6 1970); *United States* v. *Shelton*, 573 F.2d 917 (CA6 1978) cert. den. 439 U.S. 827, 99 S.Ct. 99, 58 L.Ed.2d 120 (1978).

In *Nye & Nissen* v. *United States*, 336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919 (1949), the Supreme Court affirmed one defendant's convictions for conspiracy as well as aiding

and abetting. The court rejected the contention that there was insufficient evidence to support the conviction for aiding and abetting, stating:

> "The fact that some of the evidence may have served double duty by also supporting the charge of conspiracy is of course immaterial." *Id.* at 619, 69 S.Ct. at 770.

In *Pereira* v. *United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1953), in the course of affirming one petitioner's conviction for conspiracy as well as aiding and abetting, the court stated:

> "Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy . . . . Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses — proof of an agreement to commit an offense against the United States . . . " *Id.* at 11-12, 74 S.Ct. at 364.

In the *Pereira* case, the same evidence was used to support both the conspiracy conviction and the substantive offense. See also *United States* v. *Shelton*, *supra*; *United States* v. *Bright*, 630 F.2d 804 (CA5 1980); *United States* v. *Cowart*, 595 F.2d 1023 (CA5 1979); *United States* v. *Fife*, 573 F.2d 369 (CA6 1976); *United States* v. *Rodriguez*, 612 F.2d 906 (CA5 1980).

In *United States* v. *Sutton*, 642 F.2d 1001 (CA6 1980), the Sixth Circuit recently explained that:

> "Scholarly debate has not ceased concerning whether or not Congress *should* make conspiracy

to commit unlawful acts a crime separate from the substantive offense. The law pertaining to this issue has, however, been settled at least since 1945, when the Supreme Court decided *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). In that case . . . the late Justice William O. Douglas spelled out in detail the law pertaining to the proofs necessary to establish a criminal conspiracy and the relationship between conspiracy and substantive crimes . . . .

> 'It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses . . . . A conviction for the conspiracy may be had though the substantive offense was completed . . . . And the plea of double jeopardy is no defense to a conviction for both offenses . . . . It is only an identity of offenses which is fatal . . . . '

"Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States*, *supra*, 298 F.[911] p. 913, [(5th Cir.)] 'If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.' The agreement to do an unlawful act is even then distinct from the doing of the act.

* * *

'Much more recently, the Supreme Court has cited the *Pinkerton* case with approval in *United States* v. *Iannelli*, *supra*. There, Justice Powell said for the Court:

> 'Traditionally, the law has considered conspiracy and the completed substantive offense to be separate crimes. Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act . . . . Unlike some crimes that arise in a single transaction, . . . the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act . . . . Thus, it is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end . . . . Indeed, the Court has even held that the conspiracy can be punished more harshly than the accomplishment of its purpose . . .' " *Id.* at 1018-1020.

[5] Thus, the essence of conspiracy is proof of a conspiratorial agreement, while aiding and abetting, in contrast, occurs where the defendant in some manner associates himself with the adventure, participates in it as in something he wishes to bring about, and seeks by his action to make it succeed.

Defendant, however, argues that, pursuant to the Sixth Circuit's decision in *Austin*, his sentences for both the substantive counts and the conspiracy count are violative of the double jeopardy clause. Austin was convicted in the trial court of aiding and abetting and offering a bribe in violation of 18 U.S.C. § 201(f) and 18 U.S.C. § 2, accepting a bribe in violation of 18 U.S.C. § 201(g) and

conspiracy to violate 18 U.S.C. § 201(f) and (g). The court sentenced the appellant to two years on each of the substantive counts and to four years on the conspiracy count. All sentences were to run concurrently, and on appeal the defendant alleged that he was denied his Fifth Amendment rights against double punishment for the same offense when he received sentences both on the two substantive counts and on the conspiracy count.

While noting that a defendant generally does not receive double punishment in violation of the Fifth Amendment when he is convicted and sentenced for a substantive offense and also for a conspiracy offense, the Sixth Circuit nevertheless held that the substantive offenses merge with the conspiracy count for purposes of sentencing. In so doing, the court focused on the evidence actually adduced at trial and on the facts as alleged in the indictment, rather than on the statutory elements of the offenses charged:

> " . . . The test to be applied to determine whether the offenses are separate or essentially congruent is the 'same evidence' test. As the Supreme Court has held, whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to the single act.
>
> "Our examination of the record persuades us that essentially the same evidence in this case was relied upon to prove both the conspiracy count and the substantive offenses. The proof was offered indiscriminately on all three counts and it would be difficult, if not impossible, to weed out any item of evidence that was not pertinent to all counts. The overt acts in the fourth count were all relevant in proving the substantive offenses as well as the conspiracy.

"Our ruling does not mean that proof of bribery offenses condemned by 18 U.S.C. Secs. 201(f) and 201(g) would necessarily in all cases require proof of an agreement or joint action — the essence of a conspiracy. For these statutory offenses may or may not involve an agreement or a concert of action between two or more persons. Both subsections condemn certain acts of a single individual as well as acts of two or more persons.

"In the present case, however, the substantive offenses charged in counts one and three in effect charged the same agreement or concert of action on the part of Austin and others, as charged in the conspiracy count. Since proof of the substantive offenses, as alleged in counts one and three of the indictment, also proved every essential element of the conspiracy, as charged in count four, appellant was doubly punished in violation of the Fifth Amendment." *United States* v. *Austin, supra*, 529 F.2d at 562-64.

However, the Sixth Circuit has apparently limited *Austin* to those situations in which an indictment is drawn in such a way that the substantive offense in effect charges the same agreement or concert of action as that charged in the conspiracy count. In *United States* v. *Fife*, 573 F.2d 369 (CA6 1976), the defendant was convicted of conspiracy to travel in interstate commerce for the purpose of committing arson and of conspiracy to use the mails to defraud. The defendant was also convicted of three substantive counts of interstate travel to commit arson. On appeal, the defendant, relying on *Austin*, contended that the conspiracy and substantive counts charged him with identical offenses and that the counts therefore merge, precluding separate punishment

on the two counts. The court disagreed, distinguishing *Austin* in the process:

> "The test for determining if an indictment charges one offense or separate offenses was established by the Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, [182] 76 L.Ed. 306 (1932). In *Iannelli* v. *United States*, 420 U.S. 770, 785, 95 S.Ct. 1284, 1294, 43 L.Ed.2d 616 (1975), the Court pointed out that there may be a 'substantial overlap' in the proof offered to support two charges but that the *Blockburger* test is satisfied so long as 'each provision requires proof of a fact that the other does not . . . . ' In *United States* v. *Austin*, 529 F.2d 559 (6th Cir. 1976), the indictment was drawn in such a way that the substantive offenses 'in effect charged the same agreement or concert of action . . . ' involving the defendant and other persons as was charged in the conspiracy count. Under these circumstances we held that there was a merger of offenses. The indictment in the present case is not drawn in the same way as the indictment which the court considered in *Austin*.
>
> Of course the essence of a conspiracy is an agreement to commit an offense. A conviction under count one required proof of an agreement. Count three, on the other hand, charged interstate travel and causing interstate travel by the arsonist. The fact that the offenses charged in the substantive counts all related to a single event which was the ultimate purpose of the conspiracy is immaterial. The substantive offenses do not require an agreement whereas the conspiracy does. There may be conviction and punishment both for a conspiracy and for aiding and abetting

in commission of a substantive offense so long as the 'separate offense' test of *Blockburger* is met . . . . Essentially the same arguments as those made by Klein in this case were considered by the court in *United States* v. *Bradley*, 421 F.2d 924, 927-28 (6th Cir. 1970) where the court stated:

> 'The commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy does not arise on a conviction for both . . . . Neither does a conviction for a substantive offense in any way merge a conspiracy charge into the substantive crime . . . . In *Pereira, supra*, 347 U.S., at 11, 74 S.Ct. 358, the Court specifically held that aiding and abetting, under the facts in that case, was a separate crime from conspiring. We can find no meaningful distinction in the facts presented here.' " *United States* v. *Fife, supra*, 573 F.2d at 372-73.

Other circuits have adhered to the view that application of the *Blockburger* test focuses on the statutory elements of the charged offense, not on the particular manner in which the offense was committed or described in the indictment. See *United States* v. *Kearney*, 560 F.2d 1358 (CA9 1977) cert. den., 434 U.S. 971, 98 S.Ct. 522, 54 L.Ed.2d 460 (1977); *United States* v. *Solano*, 605 F.2d 1141 (CA9 1979) cert. den., 444 U.S. 1020, 100 S.Ct. 677, 62 L.Ed.2d 652 (1980); *United States* v. *Wylie*, 625 F.2d 1371 (CA9 1980); *United States* v. *Cowart*, 595 F.2d 1023 (CA5 1979); *United States* v. *Bankston*, 603 F.2d 528 (CA5 1979); *United States* v. *Rodriguez*, 612 F.2d 906 (CA5 1980); *United States* v. *Bright*, 630 F.2d 804 (CA5 1980).

In its most recent consideration of the issue, the Sixth Circuit, in *Pandelli* v. *United States*, 635 F.2d 533 (CA6 1980) examined a double jeopardy claim in the context of a multi-purpose statute — violation of the Travel Act, 18 U.S.C. § 1952. The court construed the Supreme Court cases of *Whelan*, *supra*, and *Vitale*, *supra*, as "modif[ying] the abstract approach to the double jeopardy clause" traditionally employed by courts applying the *Blockburger* test. The court stated:

> " . . . The *Blockburger* test has traditionally focused 'on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial.' . . . *Whalen* and *Vitale* make clear, however, that the requisite statutory elements must be examined from the vantage point of the particular case before the court.
>
> "The *Blockburger* test, as modified in *Whalen* and *Vitale*, comes into play only after other techniques of statutory construction have proved to be inconclusive. The first step is for the court to inquire 'whether Congress intended to punish each statutory violation separately' . . . . To determine the congressional intent it is necessary to examine the statutory language and the legislative history, as well as to utilize other techniques of statutory construction . . . . The Court reaches the *Blockburger* test only when those prior techniques of construction have failed to resolve the question of whether the legislature intends to allow cumulative punishments for violation of two statutes." *Id.* at 536.

The Court, however, recognized that the *Blockburger* test properly focuses on the statutory elements of each offense rather than on the facts as alleged in the indictment:

> "The Court states in each opinion, however, that the *Blockburger* test in its modified form still 'focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial' . . . or 'the *facts* alleged in a particular indictment' . . . . Courts have always looked to the *law* the indictment claims the defendant violated. If they did not do so, they would not know even what statutes are at issue under the *Blockburger* rule. What the reviewing court must do now in applying *Blockburger* is go further and look to the legal theory of the case or the elements of the specific criminal cause of action for which the defendant was convicted without examining the facts in detail." *Id.* at 538. (Emphasis in original)

In the instant case, an examination of the elements of the respective offenses demonstrates that defendant Licavoli was convicted of separate and distinguishable offenses. A comparison of the three statutes and counts indicates that each "requires proof of a fact that the other does not."

[6] The substantive offenses charged in Counts I and II require neither no more than one person for their commission, nor do they require proof of an agreement to commit an offense against the United States. See *United States* v. *Fife, supra,* at 373; *Iannelli* v. *United States, supra,* 420 U.S. at 777, n.10, 95 S.Ct. at 1289-90 n.10. § 201(f); the basis of Count I of the indictment, proscribes the giving, offering or promising of an unlawful gratuity. It does not by its express terms include the element of criminal agreement. § 201(g), the basis of Count II, proscribes the asking, demanding, exacting, soliciting, seeking, accepting, receiving, or agreeing to receive an unlawful gratuity. Although the

defendant suggests that the agreements charged in Counts II and V of the indictment are the same for purposes of double jeopardy analysis, this argument fails for two reasons.

[7, 8] First, an "agreement to receive" an unlawful gratuity is an alternative element of the offense charged in Count II. As such, it is not required to be proven by the Government in order to sustain a § 201(g) conviction within the meaning of *Blockburger*. Unlike the statutory provisions of the Travel Act involved in *Pandelli, supra*, § 201(g) is not a multipurpose statute written with alternative jurisdictional elements and identifying alternative wrongs. § 201(g) prohibits one wrong — corruption of a public official — which can be accomplished by a variety of means, including "agreeing to receive" an unlawful gratuity. All of the means set forth in § 201(g) were alleged in the indictment; the Government was not required to particularize the means used by defendant in violating the statute. Thus, although evidence of an "agreement to receive" may have been introduced at trial, it was but one alternative means of proving a § 201(g) offense. The *Blockburger* test looks to what elements of proof a statute requires to establish its violation, not what may be incidentally alleged and proved. The existence of a double jeopardy violation turns on whether the same evidence is *required* to prove the two offenses, not the identity of the evidence actually produced at trial.

[9] Second, the "agreement to receive" an unlawful gratuity, an alternative element of § 201(g), does not require proof of a "conspiratorial agreement" under § 371:

> "[T]he giving and receiving of an unlawful gratuity are not interdependent offenses; the

donee's intent may differ from the donor's." *United States* v. *Evans*, 572 F.2d 455, 480 (CA5 1978).

The donor need not be found criminally culpable in order for the donee (in this case the public official) to be found guilty of agreeing to receive an unlawful gratuity. To the extent that a concert of action is required within the meaning of Wharton's Rule,[2] the indictment falls within the "third party exception" to Wharton's Rule. See *United States* v. *Foster*, 566 F.2d 1045, 1046-48 (CA6 1977); *United States* v. *Finazzo*, 407 F.Supp. 1127, 1130-31 (E.D.Mich. 1975).

Moreover, the indictment in the case at hand is not drawn in the same way as the indictment which the Sixth Circuit considered and focused on in *Austin*. In the instant case, Salvatore Lauricella, the public official and principal actor, was not charged in Count I of the indictment. This contrasts with the manner in which the indictment was drawn in *Austin*, where Count I charged American Motors Corporation and one of its agents with offering and promising an unlawful gratuity to Austin, the public official and principal actor, and charged Austin with procuring AMC to offer and promise him the unlawful gratuity in the same count.

Finally, assuming arguendo that the legal theory of a particular case should be accorded some weight in assessing a double jeopardy claim, the theory of the Government's case was not the same for each count. The Government did not suggest that defendant Licavoli

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[2] Wharton's Rule precludes an indictment for conspiracy to commit a substantive offense where the agreement of two persons is necessary for the completion of the substantive crime.

aided and abetted Lauricella, the public official, in "agreeing to receive" the unlawful gratuity; the prosecution asserted that the conspiratorial agreement was already in existence when defendant Licavoli joined it.

[10, 11] The dispositive fact is that Count V requires proof of an element — conspiratorial agreement — that the two substantive offenses alleged in Counts I and II do not. An overlap in factual allegations is immaterial. *Iannelli, supra*. Under the circumstances of the present case, the general rule applies: Ultimate consummation of the scheme is not essential to completing the crime of conspiracy; conversely conviction on a substantive count lies without proof of an agreement to commit the crime. The rationale underlying this rule was aptly set forth by the Sixth Circuit in *Sutton, supra*, at 1020:

> "The consistent rationale of this long line of decisions rests on the very nature of the crime of conspiracy. This Court repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense.
>
> > 'This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully obtained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally,

> makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.' *Callanan* v. *United States, supra,* [364 U.S. 587] at 593-594, 81 S.Ct. [321] at 325 [5 L.Ed.2d 312].

The sentences on all three counts will remain undisturbed, as will the imposition of fines.

An order in conformity to this opinion may be presented.

APPENDIX D

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Decided and Filed April 5, 1983)

(United States of America, Plaintiff-Appellee, v. Salvatore Finazzo and Dominic Licavoli, Defendants-Appellants — Nos. 81-1218/1219; Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.)

Before: Engel and Jones, Circuit Judges; and Neese, Senior District Judge.*

Engel, Circuit Judge. Defendants Finazzo and Licavoli appeal from a judgment entered by the United States District Court for the Eastern District of Michigan following a jury trial in which each was convicted of (1) commanding, inducing, procuring or causing the giving of an unlawful gratuity to a public official in violation of 18 U.S.C. §§ 201(f) and 2 (count I); (2) aiding and abetting a public official in asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive an unlawful gratuity, in violation of 18 U.S.C. §§ 201(g) and 2 (count II); and (3) conspiracy to violate 18 U.S.C. §§ 201(f), 201(g), 1952 and 2, all in violation of 18 U.S.C. § 371 (count V). In addition, Finazzo was convicted of count IV, which charged that he and Licavoli had aided and abetted a violation of the Travel Act contrary to 18 U.S.C. §§ 1952 and 2. Licavoli, however, was acquitted on this count.

*Hon. C. G. Neese, Senior United States District Court Judge for the Eastern District of Tennessee, sitting by designation. Judge Neese became a Senior District Judge at midnight on August 31, 1982.

In his direct appeal to this court, defendant Finazzo raises the following issues:

(1) That the proofs introduced at trial constituted a constructive amendment of the indictment, thereby depriving him of his Fifth Amendment right not to be prosecuted except on charges set forth in the grand jury indictment.

(2) The trial court erred in giving a "Pinkerton" charge[1] to the jury which permitted the defendant to be convicted of substantive crimes committed by others.

(3) His conviction on counts I, II, IV, and V amounted to double jeopardy contrary to his rights guaranteed by the Fifth Amendment.

(4) The trial court erred in denying a judgment of acquittal notwithstanding the verdict or in the alternative for a new trial because of improper argument made by the government prosecutor.

On his part the defendant Licavoli, while adopting the arguments of codefendant Finazzo by reference, also lists the following claims on appeal:

(1) That the court erred in denying his motion for a judgment of acquittal, there being insufficient proof that he was a member of the conspiracy charged.

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[1] The "Pinkerton" charge arises from *Pinkerton* v. *United States*, 328 U.S. 640 (1946), in which the Supreme Court held that a party to a continuing conspiracy could be held responsible for substantive offenses committed by a coconspirator in furtherance of the conspiracy even though the party does not participate in the substantive offenses nor have any knowledge of them.

(2) The trial court erred in giving a "Pinkerton" instruction which allowed the jury to convict him of substantive crimes committed before the defendant was shown to have joined the conspiracy.

(3) The prosecutor was guilty of gross misconduct in making improper rebuttal argument which impugned the credibility and reputation of appellant's attorney and in presenting his personal opinion as to the appellant's guilt. This misconduct deprived petitioner of his rights under the Due Process Clause to a fair trial.

(4) Because the language in the substantive count of the indictment indicates the same agreement described in the conspiracy count and because the proofs of each offense at trial were the same, there was a violation of Licavoli's rights under the Double Jeopardy Clause of the Fifth Amendment.

For the reasons which follow we affirm.

The convictions underlying these appeals were based upon events which commenced in the summer of 1973 when a small construction company, BIM, Inc., sought to obtain two contracts for the excavation and underground installation work at a proposed shopping center in Akron, Ohio. The two contracts were together worth approximately $3,000,000.00, and in order to bid thereon the company was required by the principal contractor to secure performance bonds for the full amount of the contract. No surety company would write performance bonds in the amount required without a guarantee from the Small Business Administration ("SBA") that, should BIM default on the contract, the SBA would indemnify the surety company for up to 90% of the face value of the bond. The principals of BIM, John Bobal and Frank Ilacqua, contacted one Salvatore Lauricella, Chief of the

Surety Bond Guarantee Program of the SBA in Washington, D.C. Bobal and Ilacqua offered and promised Lauricella $18,000.00 in return for the latter's assistance in obtaining SBA guarantees for the requisite performance bonds. With Lauricella's assistance, BIM eventually obtained the guarantees from the SBA and performance bonds from the Cincinnati Insurance Company. Thereafter, Bobal and Ilacqua refused to pay Lauricella the $18,000.00 which they had promised and instead stated that they would give him only $10,000.00 in full payment. Lauricella, obviously desiring to obtain the entire $18,000.00 promised him, approached his "buddy," defendant Dominic Licavoli, and asked for help. Licavoli in turn brought the problem to the attention of defendant Salvatore Finazzo. During a November 1, 1973 meeting between Licavoli and Finazzo — a meeting intercepted and recorded on tape by the Federal Bureau of Investigation ("FBI") — Finazzo agreed to help Lauricella recover the promised $18,000.00 from Bobal and Ilacqua.

At the November 1 meeting the two defendants drafted a letter to an individual referred to as "Skippy." This letter sought to enlist Skippy's aid in obtaining the full $18,000.00 promised to Lauricella.[2] This letter was delivered to Skippy by Finazzo's daughter who was at the time visiting her hospitalized mother in Detroit. On December 10, 1973, Finazzo received a telephone call (also intercepted and recorded on tape by the FBI) from an unidentified person, who told Finazzo that the matter Finazzo requested "Skip" to handle in Finazzo's letter to Skip would be "straightened out in full" on December 14, 1973. On or about December 14, 1973, Bobal and

[2] Richard Crino, the Deputy Area Administrator of the Labor Management Services Administration in Cleveland, Ohio, testified that "Skippy" is the nickname for John J. Felice, Jr., who in 1973 was the treasurer of Local 293 of the Teamster's Union in Ohio, and also a trustee for Joint Council 41 of the Teamster's Union in Ohio.

Ilacqua each wrote a check in the amount of $11,500.00 on their company account, which they then cashed. Lauricella flew to Detroit on the same day, and the government claimed at trial that the $18,000.00 debt owed Lauricella was paid by Bobal and Ilacqua in Detroit on December 14, 1973.

I.

Finazzo and Licavoli contend that the Double Jeopardy Clause of the Fifth Amendment prevents their cumulative punishment for the substantive bribery charges of counts I and II and for the conspiracy charges of count V. Finazzo in addition contends that the Double Jeopardy Clause prevents his cumulative punishment for the same substantive bribery counts and his conviction on the Travel Act violation (count IV).

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U. S. Const. Amend. V. It was held in *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969) that the Double Jeopardy Clause provides three separate protections. It "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce*, 395 U.S. at 717. Defendants' claims here involve only the third protection, that against multiple punishments for the same offense.[3]

[3] Defendant Finazzo was sentenced to a term of two years on count I, two years on count II, three years on count IV and three years on count V, all sentences to run concurrently. Licavoli was sentenced to two years on count I, two years on count II, and three years on count V, those sentences to run concurrently. In addition, however, the court imposed a $10,000.00 fine against Finazzo in connection with each count for a total of $40,000.00 and a like sum of $10,000.00 on each of the three counts which Licavoli was found guilty of, for a total of $30,000.00.

In a careful and articulate opinion, United States District Judge Horace W. Gilmore, who presided at the jury trial, rejected each of the defendants' double jeopardy claims. *United States* v. *Finazzo*, 520 F.Supp. 1085 (E.D. Mich. 1981). Recent decisions of the United States Supreme Court and indeed of our circuit have discussed the application of the Double Jeopardy Clause and, with respect to federal criminal offenses at least, have made it clear that where separate offenses have been charged and tried in the same proceeding, the question whether separate punishments may be imposed is primarily one of Congressional intent.

In *Whalen* v. *United States*, 445 U.S. 684 (1980), the Supreme Court considered a District of Columbia court's imposition of consecutive punishment for rape and felony murder committed in the course of rape. The Court held that the rape itself was a lesser and included offense of the felony murder charge and that Congress had not authorized consecutive sentences under such circumstances. The Court observed:

> ... The Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so. The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly within the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but

> also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.

Whalen, 445 U.S. at 689 (citations and footnotes omitted).

Left uncertain in *Whalen* was whether the Double Jeopardy Clause would prohibit multiple punishment in a situation where Congress clearly intended for multiple punishment to exist. That question was answered in *Albernaz* v. *United States*, 450 U.S. 333 (1981). While [illegible] "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator," Justice Rehnquist in *Albernaz* v. *United States*, 450 U.S. 333, 343 (1981), affirmed a Fifth Circuit determination that upheld consecutive sentences on counts of conspiracy to import marijuana, 21 U.S.C. § 963, and conspiracy to distribute marijuana, 21 U.S.C. § 846.[4] The Court observed that "the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution." 450 U.S. at 344. We conclude that whatever tension may have existed between existing decisions in the Sixth Circuit,[5] our inquiry under *Albernaz* is to determine whether Congress intended cumulative punishment for the separate offenses charged in the indictment under scrutiny here.

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[4] The Fifth Circuit decision is reported as *United States* v. *Rodriguez*, 612 F.2d 906 (5th Cir. 1980).

[5] *Compare Panelli* v. *United States*, 635 F.2d 533 (6th Cir. 1980), *with United States* v. *Fife*, 573 F.2d 369 (6th Cir. 1976).

At issue here are three separate statutes:

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 201. Bribery of public officials and witnesses

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(g) Whoever, being a public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; . . . shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The language of the conspiracy statute (section 371), and that of the bribery statute (section 201), authorize punishment for each violation and do not place limitations on cumulative punishment for violation of other sections by a single transaction. Therefore, the statutes on their face suggest that Congress intended to allow the imposition of multiple punishments in the instant case. A further examination of Congressional intent supports this conclusion.

As Judge Gilmore correctly observed below, one tool for determining Congressional intent in this area is the test articulated by the Supreme Court in *Blockburger* v. *United States*, 284 U.S. 299 (1932). Under *Blockburger*, courts are directed to determine whether each of the offenses charged requires proof of a fact which the others do not. 284 U.S. at 304; *see also Brown* v. *Ohio*, 432 U.S. 161, 166 (1977). Therefore, it is necessary to determine at this point the statutory elements of the offenses charged here.

For a violation of the conspiracy statute, 18 U.S.C. § 371, the government had to prove that:

(1) the defendants conspired or agreed to violate the bribery statute and that

(2) there existed an overt act in furtherance of the conspiracy.

For a violation of 18 U.S.C. §§ 201(f) and 2, the government had to prove that:

(1) Appellants aided or caused

(2) the giving, offer, or promise of something of value

(3) to a public official

(4) for or because of an official act performed by the public official.

Likewise, for a violation of 18 U.S.C. §§ 201(g) and 2, the government had to prove:

(1) Appellants aided or caused

(2) the asking, demanding, exacting, soliciting, seeking, accepting, receiving or agreeing to receive something of value

(3) by a public official

(4) for acts performed by him.

Thus examined, it is apparent that the bribery statute contains the elements of giving and receiving a bribe, while the conspiracy statute requires only an agreement and some overt act. The substantive bribery counts therefore clearly require proof of an additional element. The question then arises whether the conspiracy count requires an additional element that the bribery count does not. The government contends that the conspiracy count requires an additional element of proof of agreement while appellants contend that the government proved aiding and abetting by showing the very same agreement between appellants — *i.e.*, the agreement to put pressure on Bobal and Ilacqua to pay the SBA official a bribe as they had previously promised.

An examination of the bribery provisions reveals that proof of a conspiratorial agreement is not required for a conviction under these statutes. Defendants here mistakingly point to the evidence submitted at trial; the relevant inquiry focuses not on the evidence actually submitted, but rather examines the proof necessary to establish the statutory elements of each offense. *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). Since each offense here requires "proof of a fact that the other does not," the *Blockburger* test is satisfied, and defendants' Double Jeopardy arguments must fail.

Defendants' arguments also implicate "Wharton's Rule," however, which in brief holds that a defendant cannot be punished for conspiracy and a substantive offense if the substantive offense requires the participation of two persons. *See Iannelli* v. *United States*, 420 U.S. 770, 773 (1975). The rule traditionally was applied to offenses which by their nature required the acts of more than one person, such as adultery, incest, bigamy and duelling. *Iannelli*, 420 U.S. at 782. Wharton's Rule is not grounded in double jeopardy law, but rather "has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary." *Id*. In any case, application of Wharton's Rule here does not support defendants' arguments on appeal.

In *Iannelli* v. *United States*, 420 U.S. 770 (1975), defendants were charged with conspiracy and a substantive gambling offense. The Court rejected the defendants' argument that Wharton's Rule barred prosecution and punishment for both offenses focusing on three factors: (1) Are the parties to the agreement the only persons who participate in the substantive offense? (2) Does the crime have consequences only on those parties or also on society at large? (3) Does the agreement connected with the substantive offense pose

the same threat to society "that the law of conspiracy seeks to avert?" 420 U.S. at 782-83. In addition the Court made it clear that Wharton's Rule "is essentially an aid to the determination of legislative intent" and as such would in any event give way to a "discernible legislative judgment." *Id.* at 786.

Application of the factors listed in *Iannelli* indicates that double punishment was intended to be allowed in the present case. First, not only did there exist an unlawful conspiracy to bribe Lauricella, the SBA official, in violation of 18 U.S.C. § 371, but Bobal and Ilacqua were also guilty of aiding and causing the receipt of the bribe when they delivered the money to Lauricella. Therefore, it is clear in this case that "the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense." *Id.* at 784. The government was free to prosecute defendants for either the conspiracy or the substantive offense, or to prosecute the defendants for both offenses. Since the pool of persons who could have participated in the commission of the substantive offense here was not limited to only those persons who were parties to the original agreement, the first test of *Iannelli* is satisfied. Likewise, the second *Iannelli* test is met because the consequences of bribery not only affect the parties to the crime but also have a negative effect on society at large. Thus, bribery is distinguishable from the classic Wharton Rule offenses cited in *Iannelli*. Third, the agreement connected with the substantive offense of bribery here poses "the distinct kinds of threats to society that the law of conspiracy seeks to avert." *Iannelli*, 420 U.S. at 783. As in *Iannelli*, the agreement connected with the substantive offense is "likely to generate additional agreements to engage in other

criminal endeavors." *Id*, at 784. Finally, Wharton's Rule applies where not only the conspiracy but also the substantive offense requires "concerted criminal activity, a plurality of criminal agents." *Id*. at 785. Under the bribery statutes here, concerted activity is not required to convict; a donor may be convicted of a bribe even though the donee is not. *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir.), *cert.denied*, 439 U.S. 870 (1978).

The traditional rule of law is that conspiracy and a completed substantive offense are separate crimes. *Iannelli*, 420 U.S. at 777. It has not been shown to us that there exists any legislative intent on the part of Congress to prevent the government from seeking the imposition of separate sentences for the conspiracy and bribery offenses involved here. Therefore, defendants' arguments on this point are rejected. Finazzo contends, however, that his cumulative punishment for bribery and for count IV, the Travel Act offense, also violates the Double Jeopardy Clause.

The Travel Act, 18 U.S.C. § 1952, provides:

> § 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States,or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Again we note that nothing on the face of the statute indicates an intention in Congress to prohibit cumulative punishment for the two offenses.

As we noted earlier, to prove the bribery counts the government had to show that:

(1) Finazzo aided or caused

(2) the giving (for § 201(f)) or receiving (for § 201(g)) of something of value

(3) to or by a public official

(4) for acts performed by the official.

In contrast, under the Travel Act the government was required to show that:

(1) Finazzo caused someone to travel in interstate commerce (here, his daughter);

(2) the person had intent to commit unlawful activities while so traveling; and

(3) that the person did commit the unlawful activity.

Clearly the Travel Act requires proof of interstate travel while the bribery statute does not. Finazzo claims, however, that there is no additional element for the bribery counts because the Travel Act requires interstate travel plus bribery. Thus he argues that in this instance bribery is a lesser included offense. The government's response is that the bribery counts require proof that someone actually committed the crimes defined in 18 U.S.C. §§ 201(f), 201(g) (that is, that someone actually gave, offered or promised a bribe to Lauricella under count I, and that Lauricella asked for, demanded, exacted, solicited, sought, accepted, received, or agreed to receive a bribe under count II), while the Travel Act does not require a completed offense. Therefore, actual commission of the bribery offenses here provide the additional element which satisfies *Blockburger*. The government urges that the Travel Act does not require that the intended criminal offense actually be completed, but only that unlawful activity leading towards the completion of the offense has taken place.

In *United States* v. *Goldfarb*, 643 F.2d 422 (6th Cir.) *cert. denied* __ U.S. __, 102 S.Ct. 118 (1981), Goldfarb was convicted both of substantive offenses proscribed by the Travel Act, 18 U.S.C. § 1952, and of a conspiracy to violate the Travel Act, 18 U.S.C. § 371. It was the government's theory, supported by evidence, that

Goldfarb a Birmingham, Michigan bondsman, had traveled to Las Vegas for the purpose of engaging in a scheme whereby he would participate in the clandestine ownership of a Nevada hotel's gaming operations in violation of a Nevada statute. In his defense, Goldfarb asserted that he was merely a valued customer of the casino, a former investor, and possibly a future stockholder and officer of the corporation whose efforts to acquire owenership in the casino had not as yet been acted upon by Nevada. Holding that the evidence presented a disputed question of fact for the jury, our court observed that while proof of the commission or an attempted commission of a Federal or state defined criminal offense is an essential element of a Travel Act conviction, "it is certainly true that the . . . crime need not be actually accomplished." 643 F.2d at 426. *See also United States* v. *Pomponio*, 511 F.2d 953, 957 (4th Cir.), *cert denied*, 423 U.S. 874 (1975). Applying those principles to this case, we observe that the ultimate consummation of the conspiratorial scheme was not required for a Travel Act conviction here. Since each bribery offense required that the offense be accomplished, while the Travel Act requires only unlawful activity in furtherance of the underlying offense, the cumulative punishment imposed on Finazzo does not violate the Double Jeopardy Clause.

II.

Defedants further claim that the government's presentation of proofs amounted to an unlawful constructive amendment of the indictment. Count V of the indictment charged a conspiracy between Finazzo, Licavoli, Lauricella, Bobal and Ilacqua from on or about May 1, 1973 and continuously thereafter until January 1, 1974. Finazzo and Licavoli claim their convictions on

count V of the indictment (*i.e.*, of conspiracy to violate 18 U.S.C. § 201(f)) cannot stand because the conspiracy to bribe was complete upon the making of the offer and the promise of benefit in exchange for official action. *United States* v. *Shulman*, 624 F.2d 384, 387 (2d Cir. 1980). Thus it is claimed that the completed offer and promise were made before the two defendants here were brought in to provide the necessary muscle to make the final collection. Therefore, defendants conclude, the government proved two separate conspiracies although it had alleged only one conspiracy in the indictment.

Emphazing the fact that 18 U.S.C. § 201(f) contains the word "give" as well as "offer" and "promise," the government asserts that under section 201 the giving of the bribe was also a violation of the statute. *United States* v. *Michaelson*, 165 F.2d 732 (2d Cir.), *aff'd*, 335 U.S. 469 (1948); *United States* v. *Barnes*, 431 F.2d 878 (9th Cir. 1970), *cert. denied*, 400 U.S. 1024 (1971). Since the conduct is described in the disjunctive, a violation of any element is sufficient to complete the crime. Therefore, argues the government, since the bribe was not actually given to Lauricella before Licavoli's entrance into the conspiracy, it is evident that the conspiracy had not terminated since its ultimate object, the actual payment of the bribe to Lauricella, had not yet been accomplished. Because Licavoli (and Finazzo) joined the conspiracy before it ended, he is liable for any "acts and agreements which took place before he had joined."*United States* v. *Peraino*, 645 F.2d 548, 551 (6th Cir.) *cert. denied*, __ U.S. __, 102 S.Ct. 586 (1981); *United States* v. *Cimini*, 427 F.2d 129, 130 (6th Cir.), *cert. denied*, 400 U.S. 911 (1970).

We believe the foregoing review of the evidence belies the assertion that there was any constuctive amendment of the indictment. While defendants would have us construe the circumstances as proving a wholly separate

and distinct conspiracy on the part of Finazzo and Licavoli to extort the money which was already owed by Bobal and Ilacqua to Lauricella under their illegal agreement, there can be little doubt that the defendants played a vital effective role in carrying out and assisting the original offenses set forth in counts I and II. A review of the proofs fully satisfies us that there is no substantial likelihood that defendants were convicted of an offense other than that charged by the grand jury. *United States* v. *Beeler*, 587 F.2d 340, 342 (6th Cir 1978), *cert. denied*, — U.S. —, 102 S.Ct. 315 (1981).[6] The proof submitted at trial of a single conspiracy also justifies the trial judge's *Pinkerton* instruction with reference to the substantive offense in counts I and II. *Pinkerton* v. *United States*, 328 U.S. 640 (1946); *see* note 1, *supra*.

Finally, it is claimed that the prosecutor was guilty of improper argument in making derogatory comments about defense counsel and in expressing his opinion of the guilt of the defendants. The language employed, though perhaps ambiguous, was not construed by the trial judge as actually conveying the prosecutor's personal opinion of guilt. Since the trial judge was present and heard the language in the context and atmosphere in which it was given, we are not disposed to disturb that finding. We agree with the defendant that the remarks objected to were unseemly. These remarks however, were provoked by arguments made by the

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[6] Similarly, it is unnecessary to consider Licavoli's argument that a defendant can not be convicted of aiding and abetting a completed crime. The crime at issue here was not complete at the time Licavoli entered the conspiracy. The payment of the bribe to Lauricella took place after Licavoli joined the conspiracy, and under 18 U.S.C. § 201(f) the conspiracy to "give" Lauricella a bribe did not terminate until the bribe was actually paid to Lauricella.

attorneys for Finazzo and Licavoli, remarks which in our view were equally inappropriate. This fact does not of course excuse attorneys representing the United States from compliance with the higher duty cast upon them. *See Berger* v. *United States*, 295 U.S. 78 (1935). The prosecutor here committed similar misconduct in *United States v. Smith*, 500 F.2d 293 (6th Cir. 1974). This fact alone suggests that further sanctions might have been appropriate. At the same time any possible taint from the unseemly comment was in our judgment removed by the curative and sensible instructions given by the able judge.

Affirmed

APPENDIX E

JUDGMENT

(United States Court of Appeal
for the Sixth Circuit)

(Filed April 5, 1983)

(United States of America, Plaintiff-Appellee, vs. Salvatore Finazzo (81-1218), Dominic Licavoli (81-1219), Defendants-Appellants — Nos. 81-1218/1219)

Before: Engel and Jones, Circuit Judges; and Neese, Senior District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan.

This Cause came on to be heard on the record from the said District Court and was argued by counsel.

On Consideration Whereof, it is now here ordered an adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

No costs taxed.

Entered By Order of the Court

/s/ John P. Hehman, Clerk

Issued as Mandate: May 3, 1983

A true Copy.

Attest: /s/ Linda L. Brinson
Deputy Clerk

APPENDIX F

INDICTMENT

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 19,1975)

(United States of America vs. Salvatore Finazzo, Dominic Joseph Licavoli, Salvatore Angelo Lauricella, John P. Bobal, Frank C. Ilacqua—Criminal No. 5-80597; Violation: 18 U.S.C. 201, 1952, 371 and 2)

The Grand Jury charges:

COUNT I

From on or about the First day of May, 1973, up to approximately the Thirty First day of January, 1974, in the Eastern District of Michigan and elsewhere, Salvatore Finazzo, Dominic Joseph Licavoli, Joesph P. Bobal, and Frank C. Ilacqua, defendants herein, did directly and indirectly give and promise something of value, to wit eighteen thousand dollars ($18,000.00) to Salvatore Angelo Lauricella, who was then and there a public official as that term is defined in Section 201(a) of Title 18, United States Code, the said gift and promise being otherwise than as provide by law for the proper discharge of the official duty of the said Salvatore Angelo Lauricella, and the said gift and promise being for and because of official acts performed and to be performed by the said Salvatore Angelo Lauricella, to wit efforts by the said Salvatore Angelo Lauricella to cause and effectuate guarantees by the Small Business Administration of certain surety bonds issued by Cincinnati Insurance Company to assure performance by B.I.M., Inc. on certain construction and excavation projects.

All of the above in violation of Title 18, United States Code, Sections 201(f) and 2.

COUNT II

The Grand Jury further charges:

Between approximately the First day of November, 1973 and approximately the Thirty First day of December, 1973, in the Eastern District of Michigan and elsewhere, Salvatore Angelo Lauricella, defendant herein, being then and there a public official as that term is defined in Section 201(a) of Title 18, United States Code, through certain confederates to wit Salvatore Finazzo and Dominic Licavoli, defendants herein, did directly and indirectly ask, demand, exact, solicit, seek, accept, receive, and agree to receive something of value, to wit payment of eighteen thousand dollars ($18,000.00) from Frank C. Ilacqua and John P. Bobal; the said payment being otherwise than as provided by law for the proper discharge of the official duty of the said Salvatore Angelo Lauricella, and the said payment being for and because of official acts performed and to be performed by the said Salvatore Angelo Lauricella, to wit efforts by the said Salvatore Angelo Lauricella to cause and effectuate guarantees by the Small Business Administration of certain surety bonds issued by Cincinnati Insurance to assure performance by B.I.M., Inc. on certain construction and excavation projects.

All of the above in violation of Title 18, United States Code, Sections 201(g) and 2.

* * *

COUNT IV

The Grand Jury Further Charges:

That shortly after the first day of November, 1973, in the Eastern District of Michigan, Salvatore Finazzo and Dominic Joseph Licavoli, defendants herein, did cause Anna Marie Milano, not named as a defendant herein, to

travel in interstate commerce from Mount Clemens, Michigan, in the Eastern District of Michigan to Cleveland, Ohio, the said Salvatore Finazzo and Dominic Joseph Licavoli having then and there an intention to promote and carry on and facilitate the promotion and carrying on of an unlawful activity, the said unlawful activity being bribery in violation Title 18, United States Code, Section 201; and the said Salvatore Finazzo and Dominic Joseph Licavoli did thereafter promote, carry on, and facilitate the promotion and carrying on of the said unlawful activity, to wit, bribery in violation of Title 18, United States Code, Section 201.

All of the above in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT V

The Grand Jury Further Charges:

1.) That from on or about the First day of May, 1973, and continuously thereafter up to and including the Thirty First day of January, 1974, in the Eastern District of Michigan and elsewhere, Salvatore Finazzo, Dominic Joseph Licavoli, Salvatore Angelo Lauricella, John P. Bobal and Frank C. Ilacqua, defendants herein, did unlawfully, wilfully, and knowingly combine, conspire, confederate, and agree together and with each other, to commit offenses against the United States, to wit:

2.) It was part of the said conspiracy that, Salvatore Finazzo, Dominic Joseph Licavoli, John P. Bobal, and Frank C. Ilacqua, would directly and indirectly give and promise something of value, to wit eighteen thousand dollars ($18,000.00) to Salvatore Angelo Lauricella who would be then and there a public official as that term is definded in Section 201(a) of Title 18, United States Code, which said gift and promise would be otherwise

than as provided by law for the proper discharge of the official duty of the said Salvatore Angelo Lauricella, and which said gift would be for and because of official acts performed and to be performed by the said Salvatore Angelo Lauricella, to wit efforts by the said Salvatore Angelo Lauricella to cause and effectuate guarantees by the Small Business Administration of certain surety bonds issued by Cincinnati Insurance Company to assure performance by B.I.M., Inc. on certain construction and excavation projects; all of which would be in violation of Title 18, United States Code, Sections 201(f) and 2.

3.) It was further a part of the said conspiracy that Salvatore Angelo Lauricella, who would be then and there be a public official as that term is defined in Section 201(a) of Title 18, United States Code, through certain confederates, to wit, Salvatore Finazzo and Dominic Licavoli, would directly and indirectly ask, demand, exact, solicit, seek, accept, receive, and agree to receive something of value, to wit, payment of eighteen thousand dollars ($18,000.00) from Frank C. Ilacqua and John P. Bobal; which said payment would be otherwise than as provided by law for the proper discharge of the official duty of the said Salvatore Angelo Lauricella, and which said payment would be for and because of official acts performed and to be performed by the said Salvatore Angelo Lauricella, to wit efforts by the said Salvatore Angelo Lauricella to cause and effectuate guarantees by the Small Business Administration of certain surety bonds issued by Cincinnati Insurance Company to assure performance by B.I.M., Inc. on certain construction and excavation projects; all of which would be in violation of Title 18, United States Code, Sections 201(g) and 2.

4.) It was further a part of the said conspiracy that Salvatore Angelo Lauricella, aided and abetted by John P. Bobal and Frank C. Ilacqua, would travel in interstate commerce from Detroit, Michigan, in the Eastern District of Michigan to Akron, Ohio with intent to promote, carry on, and to facilitate the promotion and carrying on of an unlawful activity, which said unlawful activity would be bribery in violation of Title 18, United states Code, Section 201; and the said Salvatore Angelo Lauricella aided and abetted by John P. Bobal and Frank C. Ilacqua would thereafter promote, carry on, and facilitate the promotion and carrying on of the said unlawful activity, which would be bribery in violation of Title 18, United States Code, Section 201; all of which would be in violation of Title 18, United States Code, Sections 1952 and 2.

5.) It was further a part of the said conspiracy that Salvatore Finazzo and Dominic Joseph Licavoli would cause Anna Marie Milano, not named as a defendant herein, to travel in interstate commerce from Mount Clemens, Michigan, in the Eastern District of Michigan to Cleveland, Ohio, and, the said Salvatore Finazzo and Dominic Joseph Licavoli, would then have an intention to promote and carry on and facilitate the promotion and carrying on of an unlawful activity, which said unlawful activity would be bribery in violation of Title 18, United States Code, Section 201; and the said Salvatore Finazzo and Dominic Joseph Licavoli would thereafter promote, carry on, and facilitate the promotion and carrying on of the said unlawful activity, which would be bribery in violation of Title 18, United States Code, Section 201; all of which would in violation of Title 18, United States Code, Sections 1952 and 2.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of the said conspiracy and to effect the objects thereof:

1.) On November 1, 1973, Salvatore Finazzo and Dominic Joseph Licavoli engaged in a meeting and conversation with each other.

2.) On October 8, 1973, Salvatore Angelo Lauricella, John P. Bobal, and Frank C. Ilacqua met with each other and with Eugene Saulcy and Charles T. Davis.

All of the above in violation of Title 18, United States Code, Section 371.

A True Bill

/s/ James H. Bailey
Foreman

/s/ Ralph B. Guy, Jr.
United States Attorney
Eastern District of Michigan

/s/ Robert C. Ozer
Special Attorney
United States Department of Justice
940 Federal Building
Detroit, Michigan 48226

Dated: April 9, 1975